No. 14188

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

BRIEF OF APPELLANTS, Bart McKenney and Marie McKenney, individually and as co-partners in McKenney Logging Company.

Appeals from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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JURISDICTION

Plaintiff, Appellee, Buffelen Manufacturing Co., is a corporation incorporated and existing under the law of the State of California. Each of the defendants except Edward M. Buol and McKenney Logging Corporation

is a citizen of the State of Oregon. Defendant Edward M. Buol is a citizen of the State of Washington and defendant McKenney Logging Corporation is a corporation incorporated and existing under the laws of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs the sum of $3,000.00 (Complaint, Paragraph I, Tr. 3). Jurisdiction of the District Court existed by virtue of the amount in controversy and the diverse citizenship (Title 28, Sec. 1332, U.S.C.). This Court has jurisdiction under Sec. 1291, Title 28 U.S.C.

STATEMENT OF THE CASE

The District Court granted certain injunctive relief and awarded the following sums as damages to Appellee against the Appellants:

1. $168,000 against the Appellants, defendants below, Bart McKenney, Marie McKenney, Einar Glaser and Dorothy Glaser, jointly and severally;
2. $268,000 against the Appellant McKenney Logging Corporation.

$118,000 thereof was for alleged loss of profits in the operation of Appellee's mill (herein referred to as Batterson Mill). $50,000 thereof was for alleged cutting of logs from the lands involved herein, and the additional $100,000 awarded against the corporate defendant, McKenney Logging Corporation was for trespass in such cutting of logs.

The Appellants, McKenney and Glaser, operated as partners under the name of McKenney Logging Company until this controversy arose.

The Appellants, Bart McKenney and Marie McKenney (who will at times herein be referred to as McKenneys) have appealed separately from the other Appellants, Glasers and the McKenney Logging Corporation, and this is the brief of the Appellants, McKenneys.

This is an action for breach of a contract concerning the cutting and sale of logs from lands in Tillamook County, Oregon and the supplying of logs to a small mill (capacity 45,000 feet per shift) which mill is located on such lands at a point called Batterson. The mill is referred to throughout the case as the Batterson mill. The contract is dated January 8, 1948 and is between the Appellee-plaintiff below, Buffelen Manufacturing Co., assignee of Buffelen Lumber & Manufacturing Co. (Tr. 151) as purchaser of the logs and Bart McKenney and Marie McKenney and Einar Glaser and Dorothy Glaser, partners doing business under the name McKenney Logging Company of the defendants below and Appellants here as loggers and sellers of the logs. That contract is plaintiff's Exhibit 1 in the case and will be at times hereinafter so designated for convenience. It is set out in full at pages 125 to 146 in transcript of record. A supplemental agreement thereto is dated May 10, 1948 (Tr. 146-150). The contract and the supplement thereto involves large timber holdings, 110 to 130 million feet in the area known in Oregon as the Tillamook Burn, which Burn comprises more than one-half of Tillamook

County in the Northwestern part of Oregon on the Pacific Coast. (The name is due to a disastrous fire which occurred in 1935.)

The controversy herein arose in September, 1951, when the partnership, McKenney Logging COMPANY, attempted to transfer their rights under the contract (Exhibit 1) to McKenney Logging CORPORATION, which Corporation had been then organized under the laws of the State of Washington by the defendants Edward M. Buol and J. B. Carr for the purpose of acquiring such rights. The contract contains a provision that the contract cannot be assigned without written consent of both parties (Tr. 134). Appellee, Buffelen Manufacturing Company claims that it did not give its consent to the attempted assignment and the District Court found that written consent had not been given (Finding IX, Tr. 88). This action is also against the McKenney Logging Corporation for trespassing and wrongfully cutting timber, for inducing breach of the contract, Exhibit 1, and for damages arising therefrom.

The contract, Exhibit 1, among other things states that the partners in the contract designated as Loggers had for the past several years been engaged in acquiring timber and timber lands and logging contracts in Tillamook County, Oregon, and adjacent territory and had been actively engaged in the logging business in such district; and the Appellee, Buffelen Manufacturing Company (designated in the contract as the "Lumber Company") and the Appellant, McKenney Logging Company, Appellants (designated in the contract as "Log-

gers"), had during such time had under oral or written contracts the first and exclusive option to purchase all of the entire output of the partners, McKenney Logging Company and had "generally speaking" purchased all of said output (Tr. 126) (such prior written contract was dated May 22, 1946, being rejected pre-trial Exhibit 24 herein, Tr. 556-563 and Tr. 281). The McKenney Logging Company (the partners) had in carrying out their operations by January 8, 1948 (date of Exhibit 1) acquired timber and timber lands aggregating some 20 sections which included the tracts owned or controlled by one Scritsmier & Co. (Tr. 311). In addition thereto, the McKenney Logging Company (the partners) had made a contract with one Belding Logging Company for the logging of a certain tract of green timber in the same area which green timber includes Sec. 6, so mentioned and discussed at various times throughout the testimony in this case. The Belding contract covered about two sections of land (Tr. 311). The Appellee, Buffelen Manufacturing Company (at times herein called Buffelen), advanced sums aggregating $130,000.00 for the acquisition of timber lands and timber rights covered by the Belding contract. All of such timber so acquired had been under contract to McKenney Logging Company. When Buffelen advanced sums aggregating $130,000.00 to $140,000.00 Buffelen took the timber and lands then under contract from Belding Logging Company to McKenney Logging Company in its own name, Buffelen (Tr. 282-284; Schedule A attached to Exhibit 1, and Schedule B attached to Exhibit 1, Tr. 142, 143).

On Schedule C attached to Exhibit 1 is a list of the timber lands and cutting rights standing in the name of McKenney Logging Company, the partnership (Tr. 145). The above mentioned supplemental agreement between Buffelen Lumber & Manufacturing Company and the McKenney Logging Company (partnership), dated May 10, 1948, Plaintiff's Exhibit 2 (Tr. 146-147), refers to the advances made for the purchase of the said Belding, Scritsmier and Yellow Fir Company timber and lands and the method of repayment ($5.00 per M) on all merchantable logs taken from the lands owned or controlled by either the Lumber Company (Appellee) or the Loggers (partnership) until all of the money advanced to the Loggers, McKenney Logging Company (partnership) had been repaid; and said supplemental agreement (Exhibit 2) receipts for an additional advance of $24,000 for use by the Loggers (partnership), in the acquisition of the "Piatt" contract for cutting rights from the State of Oregon. The supplemental agreement gave Buffelen Manufacturing Company (Appellee) first right and option to purchase all of the logs produced from the timber under this "Piatt" contract acquired by the partnership at the market price or mill-pond price the same as provided under the contract of January 8, 1948, Exhibit 1. The $24,000 would be repaid by the Lumber Company (Appellee), deducting $10 per thousand feet, log scale, from the market price or mill-pond price as determined under the Agreement between Buffelen (Appellee) and McKenney Logging Company (partnership) dated January 8, 1948 (Exhibit 1 herein). Buffelen Manufacturing Company, Appellee, and Mc-

Kenney Logging Company (partnership) operated under the contract and supplement (Exhibit 1 and Exhibit 2) until about September 5, 1951, when the McKenney Logging Corporation, the Washington Corporation, one of the Defendants-Appellants herein, organized by the defendants herein, Edward M. Buol and J. B. Carr, as above stated, obtained possession and control of these large holdings by a plan engineered by one E. R. Errion, a real estate broker (Tr. 41). The payment to the partnership was evidenced solely by two notes for $575,000 each and a mortgage on all of the above mentioned holdings. The approximate value of such holdings at that time was $1,150,000 (Tr. 44-46, Cross-complaint filed by Appellant-Defendants Bart McKenney and Marie McKenney). Such Cross-complaint was dismissed by the District Court on jurisdictional grounds.

The Plaintiff-Appellee, Buffelen Manufacturing Company admitted during the trial in the District Court (Tr. 286, 287) performance by the company, the partnership, of all conditions of the contract except in only two respects. 1. In attempting to assign the contract without Buffelen's consent and 2. in failing to give Buffelen the first option to buy logs produced from the properties.

It is also admitted in the Pre-trial Order as agreed fact IV, "By June of 1950, defendants McKenney and Glaser" (the partnership) "had repaid plaintiff" (Buffelen) "all loans and advances made to them by it, including plaintiff's loans and advances for the purchase of the timber lands and cutting rights covered by the contract

which is identified as plaintiff's Exhibit 1, together with interest thereon" (Tr. 12). The partnership had paid the taxes on all of the land and timber rights, including the above mentioned Belding tract which is in the name of Buffelen the Appellant (Tr. 285). The outlay by Buffelen for the purchase of the Belding tract above mentioned was $3.50 per thousand on 32,000,000 feet of green timber. The McKenney Logging Company, prior to such advance by Buffelen, had this green timber under contract with Belden, and owned and/or controlled about 200,000,000 feet of dead timber in this large area (Tr. 282) which is generally known as the Tillamook Burn area.

Plaintiff's Exhibit 16 (Tr. 391) being a Recap. of footage bought by Buffelen from the McKenney Logging Company (partnership) under the contract, Exhibit 1, prior to the controversy involved herein further indicates the size of their logging operation and shows that Buffelen purchased 55,546,171 feet of logs and paid to the partnership $3,490,991.88 therefor. It is uncontroverted that Buffelen paid the market price for such logs with no deductions for stumpage other than the amounts deducted for repayment of the above mentioned advances of $120,000 and $24,000. After the advances had been repaid to Buffelen and all advances had been repaid before this controversy and trial (Tr. 285, 286), Buffelen paid the full market price (which market price was established as hereinbelow stated) for the logs to the partnership in the same manner as if Buffelen had purchased them from third parties in the open market. Logs that Buffelen did not buy were then sold in the open market at the same prices which Buffelen would have been re-

quired to pay if Buffelen had purchased such logs, and it is uncontroverted that the entire proceeds of such sales belonged to and were kept by the partners, the Loggers.

Raft 44M discussed frequently during the trial of the case, first discussed at page 182, transcript of record, contained logs which had been cut from lands listed on Schedule A of Exhibit 1, which lands then stood and still stand of record in the name of Buffelen Manufacturing Company. Raft 44M (M is McKenney Log Brand) contained peeler logs (Tr. 291). Buffelen's manager Holm in part testified, "To my knowledge it was the first raft of green logs coming out of the Tillamook Yellow Fir area" (Tr. 182). The raft was sold to purchaser other than Buffelen. It was scaled September 4, 1951, about the time this controversy arose (Tr. 306). A witness for the plaintiff, Roy Gould, testified that stumpage on Yellow Fir, Green Fir cut from the land standing in the name of Buffelen, particularly in Section 6 (see Schedule A, Exhibit 1. Section 6 is mentioned in the testimony first at Tr. 223) had a market price of $25 per M. The District Court among other things found that the McKenney Logging Corporation who had obtained control of the partnership properties about September 5, 1951, had cut 2,000,000 feet of such stumpage of the value of $25 per thousand feet (Finding of Fact X, Tr. 88) and awarded judgment against the partners for $50,000 and against the Corporation for $150,000 (treble damages under Oregon Statute). Yet, on October 3, 1951, Buffelen Manufacturing Company tendered its check payable to the partnership for $19,379.86 for Raft 46M which had been sold to a purchaser other

than Buffelen and which also contained logs cut from above mentioned Sec. 6 for which the full market price was included in such $19,379.86 tendered (Plaintiff's Exhibit 4, Tr. 154-156). The check so tendered was, of course, returned to Buffelen. So that the partnership has been held by the Court in effect not to be the owner of the stumpage if it failed to offer the logs to Buffelen, but entitled to full payment for the stumpage in the same manner as if the timber stood in the name of the partnership if the logs cut therefrom were tendered to Buffelen although Buffelen refused to purchase them and the logs so cut were sold to others than Buffelen. Likewise, if Buffelen bought the logs so cut Buffelen would pay the full market price to the partnership which, of course, includes the $25 per thousand for stumpage which $25 price was set by witness Gould as above stated.

Further, the District Court allowed $118,000 damages to Buffelen Manufacturing Company against the partnership for loss of profits in the operation of the Batterson mill resulting from the failure of the partnership to offer the logs to Buffelen. This matter of loss of profits will be discussed hereinbelow in detail, but in passing it is important to mention here that under the judgment allowed of $50,000 (the above mentioned 2,000,000 feet at $25 per M.) for logs cut from Section 6 and not offered to Buffelen the partnership is assessed damages for logs which, if they had offered them to Buffelen and Bueffelen had refused to purchase them the partners would have been entitled to sell them elsewhere and been entitled to the $50,000, and if Buffelen

had purchased them, the partners would still have been entitled to the $50,000 (Plaintiff's Exhibit 4, Tr. 154-156). The District Court concluded that the contract of January 8, 1948, as supplemented by agreement May 10, 1948, above mentioned, Exhibit 1, did not terminate upon repayment of the loan and advances made thereunder (Conclusion of Law VII, Tr. 92) and permanently restrained the partners from breaching the contract and declared the purported sale to the McKenney Logging Corporation (above mentioned) cancelled and void. So that the contract was at all times in effect and remained in effect by the District Court Judgment and Decree herein (Tr. 95, 96).

Also, the very logs for which the partners are charged $50,000 in damages by the District Court constitute the basis for part of the $118,000 damages charged by the District Court against the partners for loss of profits in the operation of the mill at Batterson for failure of the partners to tender the same logs to the Batterson mill.

The contract (Exhibit 1) states in part that, "After all advances on the Logger's notes or open account have been paid, the Loggers shall pay to the Lumber Company, as stumpage, for all timber removed from the Lumber Company's lands at the actual cost to the Lumber Company of the average of the Lumber Company's timber holdings in that area. This cost shall consist of the amount actually paid by the Lumber Company for such timber, together with interest thereon at the rate of four per cent per annum at the time of such purchase, as well as all taxes, insurance, if any, and any and all other expenses to which the Lumber Company has been

put in acquiring such timber holdings . . ." As above stated, it is admitted in the pre-trial order that the Loggers, the McKenney Logging Company, the partnership had repaid the Lumber Company, Buffelen, all of its advances, including Buffelen's advances for purchase of timber lands and cutting rights covered by the contract (Exhibit 1, Paragraph IV, Pre-trial Order, Agreed Facts, Tr. 16).

The contract also states that the primary purpose of the Lumber Company in the purchase of the timber tracts, Belding, Scritsmier and Yellow Fir Company, above mentioned, was to keep its mill at Tacoma and the mill which it was then building, the Batterson mill, in logs and with no desire on its part to make a profit out of the logging end of its business, either during the logging operations by the Logger or at the conclusion of its operations in the area. (Tr. 129, Exhibit 1).

Buffelen had no facilities for cutting veneer at the Batterson mill and therefore had no need for peeler logs (Tr. 337). Buffelen, of course, had not purchased all of the logs produced from the lands covered by the contract. Buffelen had virtually stopped buying logs under the contract for processing at Tacoma long before this controversy arose (Exhibit 16, Tr. 391). The logs not purchased by Buffelen, some less than half, were sold by the partnership to various buyers on the Columbia River (Tr. 300). The average daily production of logs by the partnership ran from 150,000 to 250,000 feet (Tr. 301). The logs had a market. All logs not purchased by Buffelen were sold freely at the market price at As-

toria, Oregon and elsewhere on the Columbia and Willamette Rivers. Astoria, Oregon is only 50 miles from the Batterson mill (Tr. 302). There was a market price for logs at the Batterson mill (Tr. 391, Plaintiff's Exhibit 16).

About the time this controversy arose, one Roy Gould (above mentioned), operator of the Diamond Lumber Company, had an arrangement with Buffelen in anticipation of the purchase of the Batterson mill by Gould and under such arrangement gave the operating instructions in connection with the mill during October and November, 1951 (Tr. 219, 231). Gould's compensation for such operation during October and November, 1951, was whatever profit he could make out of it (Tr. 235). The agreed purchase price to Gould was $250,000 (Tr. 237). Mr. Andrew Koerner, of Koerner, Young, McColloch & Dezendorf, Attorneys, Portland, Oregon, and attorneys and counsel for Plaintiff-Appellee in the instant case, represented Gould in this proposed transaction (Tr. 237, 381, 384). Gould testified for plaintiff that $8,000 to $10,000 a month would be an expected profit from the operation of the mill (Tr. 220). *Gould was to assume the losses,* if there were any losses sustained for his period of operating under the above arrangement (Tr. 255). The result of the operation under Gould for October and November of 1951 was a substantial loss (Tr. 221). It is upon Gould's testimony as an expert and Exhibits 19a, b, c and Exhibit 22 (such exhibits are discussed hereinbelow) with Buffelen, that Appellee relies to sustain an award by the District Court of $118,000 damages against the partners, Appellants

for loss of profits in the operation of the Batterson mill from the time this controversy arose, about September 5, 1951, until the second hearing of this case December 5 and 6, 1952.

A circumstance that may be mentioned here is that this case was tried in the District Court on January 14, and 15, and 16, 1952, and on January 16, 1952, the trial judge took the case under advisement. The Appellants, two of the defendants below, Bart McKenney and his wife Marie McKenney, thereafter concluded to change attorneys. All of the Appellants, defendants below, had until then been represented by the same attorneys, W. J. Prendergast, Jr. and Leo Levenson. In the latter part of February or the first part of March, 1952, the Appellant Bart McKenney and his wife brought the case to Mr. Theodore B. Jensen of his present counsel. Mr. Jensen is related to Marie McKenney, wife of Bart McKenney (Tr. 438). One of the disputed questions at the trial of January 14-16, 1952 (hereinafter referred to as first hearing) was whether or not the Appellant McKenney Logging Corporation had knowledge of the contract which is the subject of this litigation prior to September 21, 1951. On January 15, 1952, Bart McKenney testified when produced as a witness on behalf of plaintiff, to the question asked counsel for Plaintiff-Appellee—"Did you tell any representative of McKenney Logging Corporation prior to the attempted sale of the existence of the January 8, 1948 contract?" Answered, "No." And to a further question "You say you did not?" Answered, "I didn't" (Tr. 445). On March 31, 1952, counsel for Appellee, Buffelen, orally moved to re-open the case and on

the same day present counsel for McKenneys moved to be substituted as attorneys for McKenneys. The latter motion was based upon an affidavit that McKenneys had a good cause of suit against the other defendants (Tr. 32). The trial court took the motion under advisement and on June 23, 1952, made an order granting both motions (Tr. 34).

On the second hearing December 5, 1952, Bart McKenney testified that the contract had been discussed at conferences when the defendant J. B. Carr, who became and is an officer in the defendant McKenney Logging Corporation, was present (Tr. 429, 434, 435). The trial court found that the "McKenney Logging Corporation was charged with full knowledge of plaintiffs interests and rights under the contract above set out" (Tr. 72 and Conclusions of Law IV, Tr. 91).

On December 1, 1952, plaintiff filed a supplemental complaint alleging an increase in damages of $200,000 (Tr. 66) over the $100,000 general and the $300,000 punitive damages it had asked for in its original complaint (Tr. 405).

A supplemental pre-trial order (Tr. 66) was made December 5, 1952, wherein it was agreed that the original pre-trial order entered herein on January 14, 1952 as supplemented by such order should form the basis for the re-trial of this action. Further, the supplementary order provides that the evidence to be offered on the re-trial should be directed to issues of fact NUMBERED IN THE ORIGINAL so that, except for the increase of the alleged amount of damages, no changes in the original

pre-trial order occurred because of the amended answer and the cross-complaint filed by McKenney and the answers thereto by the other defendants as heretofor set forth.

LOSS OF PROFITS

Plaintiff has attempted to show a profitable operation of the Batterson mill for a period from April 1, 1948 through June 30, 1951 by its Exhibits 19a, 19b and 19c.

On Exhibit 19a covering a period for 12 months ended June 30, 1949 appears a book loss for the period of $6,132.62. On Exhibit 19b covering a period for 12 months ended June 30, 1950 appears a book profit for the period of $113,309.75. On Exhibit 19c covering a period for 12 months ended June 30, 1951, appears a book profit for the period of $75,743.78. Plaintiff's witness Samuel R. Miles, Assistant Secretary-Treasurer and Accountant of Buffelen Manufacturing Company testified that if you divide $113,309.75 by 12 the result would be about $9,000 a month, and if you divide $75,743.78 by 12 the result would be about $6,000 a month. When he was asked what were the market conditions during that period he stated that was out of his line (Tr. 203).

Plaintiff-Appellee also produced Exhibit No. 22—as Batterson Mill Profit and Loss Statement for fiscal year July 1, 1951-June 30, 1952 and for the period July 1, 1952 through October 31, 1952. The second hearing of this case was held on December 5th and 6th, 1952 as above stated.

SPECIFICATION OF ERROR NO. I

The Court erred in finding that plaintiff sustained damages in the amount of $118,000.00 for loss of profit of the operation of its mill at Batterson by reason of the attempted sale by defendants McKenney and Glaser of their interest in the properties and rights covered by the contract, plaintiff's Exhibit I (Finding pp. 88-89).

Said finding is clearly erroneous, in that it is not supported by substantial evidence since the only evidence in the case to support such finding is:

1. Testimony of plaintiff's witness Roy Gould (Tr. 218-24). Consists of surmise and conjecture that mill could make profits although said witness Gould's operation thereof resulted in a substantial loss.

2. Plaintiff's Exhibits 19a, 19b, and 19c, Tabulations headed Batterson Cost Reports for 12 months ended June 30, 1949, 1950 and 1951 respectively (Tr. 200, 201, 202, set out in Appendix A., pp. 47-52 of this brief), with the monthly cost reports for all of each 12 months period omitted therefrom except the first thereof, since such monthly reports are all similar, and the first of each 12 month period is believed by counsel sufficient for this illustrative purpose. Such Exhibits are wholly insufficient as substantive evidence for several reasons: one, there is no data thereon whereby it can be determined the basis upon which lumber was transfered from yard to yard of plaintiff in

order to set up the Book Profit or Book Loss stated on the exhibits.

3. Plaintiff's Exhibit No. 22—headed Batterson Profit and Loss Statement Fiscal Year July 1, 1951-June 30, 1952, and Batterson Mill Profit and Loss Statement July 1, 1952 through October 31, 1952,—follows page 479, transcript of record, offered page 475, admitted page 479. Exhibit 22 is wholly without evidentiary value until there is first sufficient substantial evidence by way of #1 and #2 immediately hereinabove. Further exhibit 22 is too vague and indefinite to serve the purpose intended.

4. Testimony of plaintiff's witness Samuel R. Miles, first hearing in connection with introduction of Exhibits 19a, b, and c (Tr. 200-205). Second hearing in connection with Exhibit 22 (Tr. 475-484). This witness added nothing to 1, 2 and 3, immediately hereinabove or otherwise.

Points and Authorities

Before a contemplated profit can be recovered the proof must consist of actual facts from which a reasonably accurate conclusion regarding the amount thereof can be logically and rationally drawn.

Randles v. Nickum & Kelly Sand & Gravel Co., 169 Or. 284, 127 P. (2d) 347.

National School Studios v. Superior School Photo Service, 40 Wash. (2d) 263, 242 P. (2d) 756, 762.

Gilmartin v. Stevens Inv. Co., Vol. 143, No. 9, Wash. Advance Sheets, 267, 261 P. (2d) 73.
United States v. Thornburg, CCA 8, 111 F. (2d) 278 at 280.

Argument

The testimony of the above mentioned witness Roy Gould, called by the plaintiff, shows that he, as the Diamond Lumber Co., had made an arrangement with the plaintiff, Buffelen, whereby he was to give the operating instructions for the Batterson mill during October and November, 1951. He had already looked over the mill in anticipation of buying it. The agreed price was $250,000. He believed that if he would have had reasonably good logs to operate on during October and November, 1951 he could have shown a substantial profit. He stated that such anticipated profit for a monthly operation would be from $8,000 to $10,000 a month, and that the output on a one shift basis would be 50,000 feet daily and on a two-shift basis about 40,000 daily additional (Tr. 220).

Gould during such operation had the status of an owner, for he was responsible for the losses and would have taken the gain if there had been any (Tr. 219, 220, 221). Under Gould's operation *there was a substantial loss* (Tr. 221). Gould attributed such loss mainly to lack of logs. To the question by plaintiff's counsel, "By buying logs on the open market down there were you able to keep enough supply to operate continuously?", Gould replied, "No, we were out of logs at times."

Such testimony was considered in *Randles v. Nickum & Kelly Sand Co.,* 169 Or. 284, a case where plaintiffs recovered a judgment in the trial court for damages, both general and special, arising out of a conversion of a stock of lumber. Plaintiffs were denied access by the defendants to a warehouse where the lumber was stored and claimed damages for loss of profits because the unavailability of the lumber to them deprived plaintiffs of profits which they would have made in construction of homes which they had contracted to build for others. The Oregon Supreme Court in rejecting the claim for loss of profits said (in part):

> "First, the evidence that profits would have been made had the houses been completed is a mere estimate of the plaintiffs. They contracted to build the houses at an agreed price, and they testified that the cost of construction in each instance would have been about $800 less than the contract price, hence a profit of $800 on each house. This, they said, was the normal profit. They produced no supporting data from which the jury could have ascertained whether a profit of $800 or in any other amount would have been realized. There was no testimony that the plaintiffs had made a profit under similar contracts" p. 287, supra.

The Oregon Supreme Court quoted from the testimony as follows (similar to the testimony given by plaintiff's witness Gould in the instant case), p. 288, supra:

> "One of the plaintiffs testified 'Q. I assume that all jobs you have taken have been profitable?
> A. Oh, no, sir.
> Q. And sometimes you make losses?
> A. Sure.
> Q. Of course, you can't tell that until you have completed your job, isn't that right?

A. Generally not from the beginning.
Q. I mean you take a loss job?
A. I have done it.' "

And the Oregon Supreme Court observed in that case that to sanction the recovery for damages for which there is no firmer foundation than was provided in *Randles v. Nickum & Kelly Sand & Gravel Co.* would be practically to remove all the safeguards which the law has wisely thrown around claims of this character. The court said that absolute certainty that there would have been profits, or certainty as to their amount, is, of course, not required. But that it is essential that the plaintiffs' present such evidence as might be reasonably expected to be available under the circumstances.

The Court cited in this connection Restatement, Torts, 580, Sec. 912, and 15 Am. Jur., Damages, 574, Sec. 157, and quoted from Sec. 157 as follows:

> "The proof must pass the realm of conjecture, speculation or opinion founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn."

The Washington Supreme Court in discussing the same question with respect to proof stated in *Gilmartin v. Stevens Inv. Co.* (Sept. 1953), Vol. 143, Wash. Advance Sheets, No. 9, p. 267 at 271, 261 P. (2d) 73, 76, as follows:

> "What is reasonable certainty depends largely on the extent to which the particular damage in issue is susceptible of accurate proof. When, for example, a plaintiff in attempting to prove loss of profit, fails to produce available records relevant to that ques-

> tion, he fails to meet the standard of reasonable certainty. *National Schools Studios, Inc. v. Superior School Photo Service, Inc.,* 40 Wash. (2d) 263, 242 P. (2d) 756."

Although Appellant, Buffelen, may suggest some claim that Gould was testifying for Buffelen as an expert, his status is much the same as the plaintiffs in *Randles v. Nickum & Kelly Sand & Gravel Co.,* p. 288 of 169 Or. Reports, for Witness George Holm, Division manager, Raw Materials of Buffelen, testified on cross-examination that Gould was to assume any losses, if there were any losses during his operation of the mill, October and November, 1951.

In *National School Studios v. Superior School Photo Studios,* 40 Wash. (2d) 263, 242 P. (2d) 756, where the employer sued a former employee for damages for breach of restrictive covenant not to compete after termination of employment, the trial court had stated on the point of loss of profits in a memorandum opinion:

> "Plaintiff is seeking both damages and an injunction. The plaintiff has shown a very substantial loss in gross revenues and customers. Plaintiff declined to show its costs, and has not proved any reliable basis for determining the amount of its loss, if any, in net profit. Consequently, plaintiff is not entitled to recover damages."

The Washington Supreme Court said that the trial court was correct in denying Plaintiff-Appellant judgment for damages because of inadequacy of its proof. The court said (in part):

> "The burden was upon appellant to prove with reasonable certainty its loss of profits caused by respondents' acts. The bare, oral statement by appel-

> lant's president that it made ten per cent profit on the dollar volume of the business obtained by Lien is a mere conclusion. It does not constitute the reasonable certainty which is required under the circumstances."

The Washington Supreme Court observed that it was common knowledge that such a corporation as Appellant which was doing business in nearly every state in the union must keep detailed books of account from which its net income could be ascertained. And that it would have been a simple matter to have computed such income with respect to the portion of its business obtained from its former employee, Lien. That the Appellant had displayed no difficulty in ascertaining from its ledger sheets the gross dollar volume of business obtained by Lien for the two years prior to his leaving its employ. The Court concluded:

> "In the absence of reasonably certain proof as to what appellant's net profit would have been had it continued to enjoy this business, there is no competent evidence upon which a judgment can be based. The burden was upon appellant to furnish such proof and this it failed to do."

In the instant case, Plaintiff-Appellee Buffelen sought to prove loss of profits in the operation of the Batterson Mill from September 1, 1951 to the time of the second hearing herein, December 5 and 6, 1952, through its Exhibit No. 22. (Received in evidence Tr. 479. The Exhibit is set out in full at Tr. 480.)

Such exhibit consists of a document entitled "BATTERSON MILL PROFIT AND LOSS STATEMENT Fiscal Year July 1, 1951 - June 30, 1952" and

"Batterson Mill Profit and Loss Statement July 1, 1952 through October 31, 1952"

From an examination thereof it will be disclosed that it contains 9 columns of figures, the 9th of which is entitled Profit or Loss and partly for the purpose of emphasizing the inadequacy of and the indefinitness of the exhibit, we are here setting out the following portions of such statements (Tr. 480):

"1951	"Profit or Loss	
July	7,609.45*	"Vac. & Closed
Aug.	8,299.54*	Closed
Sept.	8,610.00*	Closed
Oct.	6,084.59*)	Operated by Gould
Nov.	8,076.27)	his figures not
Dec.	3,425.74*	included
1952	*	
Jan.	3,302.89*	Closed
Feb.	2,733.20*	Closed
Mar.	23,657.95*	Closed
Apr.	7,890.96*	One Shift
May	4,786.81*	Strike
June"	1,642.76	One Shift"
	$66,682.10	

Average Monthly Loss 5,556.84"
"*Figures in red."

"1952	"Profit or Loss
July	570.05*
August	7,414.86
Sept.	9,189.22
Oct."	2,412.24*
	$13,621.79

Average Profit per month $3,405.45"
"*Figures in red."

As part of the objection made by counsel to this exhibit when it was offered in evidence is pertinent here we wish to quote the following part of such objection (Tr. 476):

> "It in and of itself establishes no damages because of the fact that if the contract is taken as being in existence it limits the amount of logs to be furnished to this mill at sufficient logs for a one-shift-per-day basis."

Witness William O. Gansberg, who was sent down to the Batterson Mill to procure suitable logs for the operation of the mill at Batterson by Mr. Holm, of Buffelen, testified (in part), "Well, we were able to get enough logs to run on a one-shift basis" (Tr. 469).

And in response to the question on cross-examination "How many months did the mill operate since January of this year?" (Tr. 470). (This testimony was taken at the second hearing, December 5th and 6th, 1952.), the witness Gansberg replied:

> "I believe the operation started in April and it was down for a time because of the strike, and then down for a time in October because of lack of logs due to no logs being put in because the loggers were shut down.
> Q. They were shut down on account of fire weather.
> A. That is right, yes" (Tr. 471).

This Exhibit 22 must remain out of the case until the Plaintiff-Appellee has first satisfactorily proved that the Batterson Mill made profits before September, 1951, the time when this controversy arose. Counsel for Appellee recognized this situation in the statements made to the Court at the time Exhibits 19a, 19b, and 19c, were offered in evidence by Appellee (Tr. 202). We submit

that to award $118,000 loss of profits on Exhibit 22 is to base the finding in support thereof upon conjecture and speculation.

The Appellee attempted to prove that the Batterson Mill so made profits by such exhibits 19a, b, and c. (See appendix this brief). But by inspection of such exhibits, all of which were admitted as SUBSTANTIVE EVIDENCE and constitute the only factual data in the case, on this point, it will be observed that the documents are entitled BATTERSON COST REPORT and the figures relied upon by Plaintiff-Appellee to prove losses and profits are designated on the face of the document as BOOK LOSS AND BOOK PROFIT OR LOSS.

While Exhibit 19a, which covers the year for the 12 months ended June 30, 1949, has a designation "Value Realized" thereon and it appears on the face thereof that the Book Loss was $6,132.62, it should be noted that exhibits 19b and 19c have no such designation or any other data whatever by which it can be determined or even be presumed that the disposition of the lumber manufactured in the Batterson Mill was anything more than interdepartmental transfers from the Batterson Mill to the Tacoma plant of Buffelen Manufacturing Company.

Referring to the figures on Exhibit 19b more specifically it would appear that 18,105,662 feet of lumber had been manufactured during the year ended June 30, 1950 at a cost of $46.92 per M. of which 3,850,380 feet thereof had been sold to others at $32.55 per thousand at a loss of $14.37, (Cost $46.92, Selling price $32.55);

and 9,402 feet thereof had been transferred to Hardwood-Tacoma at $160 per M., a book profit of $113.08 per M., and 661,973.55 feet thereof had been transferred to Door Factory-Tacoma at $79.23 per M., a book profit of $32.31 per M. And 168,652.78 feet had been transferred to Sawmill at Tacoma at $28.96 per M., a book loss of $17.96 per M. And 6,673.80 feet is designated P.M. #3 transferred at $100 per M., a book profit of $53.08 per M.

BUT WHERE IS THE PROOF or data to show that such transfers were made at the market price. There is nothing to show how the price was arrived at in making such transfers. Taking the language of the Exhibits themselves, the exhibits are simply Cost Reports with some additional data as to transfer of lumber from yard to yard. The reports say Book Profit or Book Loss. Exhibit 19c is likewise of the same purport. The trial court inquired of counsel for Buffelen 9 (Tr. 204):

> "I understand, but then aren't the books here?
>
> Mr. Dezendorf: The books are not here, no.
>
> The Court: I understood you to say before that they were here.
>
> Mr. Dezendorf: But the monthly records that support the figures that we have are attached to those few exhibits. The mill was not operating in July or August of 1951, is the answer to his question."

But the "attached" "monthly records" are simply the annual statements divided in 12 parts and each of them contain the same designations with respect to transfer to Tacoma and BOOK LOSS OR BOOK PROFIT.

The witness Samuel R. Miles testified that market conditions were out of his line (Tr. 203).

Exhibit 22 must remain out of the case in the consideration of losses and profits of the Batterson Mill until it is established by evidence of the quantum and quality stated in the above mentioned authorities, that the Batterson Mill made actual profits prior to the time this controversy arose.

It is submitted that Exhibits 19a, 19b, and 19c do not afford any evidence for the purpose intended. And, of course, it must follow that witness Roy Gould's testimony does not add anything thereto. Therefore, there is no competent evidence to support a finding of loss or profits in any sum whatever. And finally such testimony in response to Counsel's leading question above quoted, "By buying logs on the open market down there . . .", and the response, "No, we were out of logs at times . . ." should be subjected to the rule, "A reviewing court is not always required to accept as substantial evidence the opinion of experts, "Where it clearly appears that an expert's opinion is opposed to physical facts or to common knowledge, or to the dictates of common sense or is pure speculation, such an opinion will not be regarded as substantial evidence." *United States v. Thornburg* (CCA 8, 1940), 111 F. (2d) 278, p. 280. For sawmill logs are so plentiful at a market price that Gould could not be out of logs because they were not available. It is common knowledge that the kind of logs. #2 mill old growth fir logs used by the Batterson Mill (Tr. 156) are in continuous supply to buyers at established market prices.

SPECIFICATION OF ERROR NO. II

The Court erred in finding that plaintiff sustained the amount of $118,000 for loss of profit of the operation of its mill at Batterson according to Finding No. XII (Tr. 88), and concluding that defendants McKenney and Glaser are liable thereof according to Conclusion of Law XI, page 93 in that the finding is against the weight of the evidence.

Argument

The points and authorities and the argument under Specification of Error No. I hereinabove are hereby made applicable with the additions hereinbelow made in the event that the Court determines there is some substantial evidence to support the finding.

The defendant Bart McKenney (Tr. 302). testified on direct examination as witness for defendants to the question, "Was there any other possible market to purchase at Batterson in the months of October and November, 1951, at the market price," that, "Well, on the railroad there is several independent operations. There is another operation within nine miles of them, an independent operation. And Tillamook County has got—there are several in Tillamook County that ship their logs up by rail. There is no reason why by paying the market price there shouldn't have been a market—there shouldn't have been logs." It is submitted that the substantial loss during Gould's operation was not mainly due to inability to get good logs.

Further, Bart McKenney testified that the Buffelen people had discouraged the partners, McKenney and Glaser in the partners' consideration of the purchase of the mill by telling them that Buffelen had never made a profit on it "except one month" (Tr. 366). And on the direct examination McKenney testified that Mr. Holm was the one who had so told him, "That is one of the things he used to beat down the price of the logs" (Tr. 368).

SPECIFICATION OF ERROR NO. III

The Court erred in admitting plaintiff's Exhibits Nos. 19a, 19b, and 19c. Exhibits Nos. 19a, 19b, and 19c are each tabulations entitled "Batterson Cost Report for the Twelve Months Ended June 30, 1949, June 30, 1950 and June 30, 1951 respectively." (See appendix this brief). The offer in evidence (Tr. 210) was made during examination by plaintiff of Samuel R. Miles, Assistant Secretary-Treasurer and Accountant for Buffelen (Tr. 201):

> "Mr. Prendergast: If the Court please, I would like to inquire of Counsel as to the purpose of this offer.
>
> Mr. Dezendorf: We contend that we are entitled to recover loss of profits to the mill from the partnership with respect to any logs which were not tendered to us for purchase and which we attempted to purchase and were unable to, and that (40) we are entitled to recover against the defendant corporation for loss of profits to the mill from the time that it took over the alleged McKenney operations until now.
>
> Mr. Prendergast: If the Court please, we object to this offer of Exhibits 19-A, 19-B, and 19-C on

the ground that they are wholly immaterial to any issue in this case; particularly that these purported profit-and-loss statements would not be the measure of any damages that would arise, and cover a period which is apparently not in controversy, either in the original pleadings which are superseded by the pre-trial order, or by the pre-trial order. They cover periods not in controversy.

Mr. Dezendorf: If the Court please, we feel that we have to show the historical background of the operation of the mill in order to support the testimony of the witnesses as to what the loss from the failure to operate would be during a period when we were unable to get logs. They are offered for the purpose of supporting the testimony of the witness as to what the anticipated profits would have been if they could have operated.

The Court: There is always great difficulty in proving anticipated profits and basing damage claims thereon. The Oregon rule has always been very liberal, and I am inclined to think it is competent. It may be that they will not support the weight of the conclusion, but nevertheless they are (41) competent for admission. Admitted."

The following developed during the cross-examination of witness Miles in connection with said exhibits, record of such cross-examination appears on page 204, transcript of record:

"The Court: Aren't the books here?

Mr. Dezendorf: Yes. Of course, as the witness has testified earlier, these figures that we have go up through June of 1951. The Batterson mill was not operated thereafter.

The Court: I understand, but then aren't the books here?

Mr. Dezendorf: The books are not here, no.

The Court: I understood you to say before that they were.

Mr. Dezendorf: But the monthly records that

support the figures that we have are attached to those few exhibits. The mill was not operating in July or August of 1951, is the answer to this question.

The Court: All right."

Argument

The objection should have been sustained. The exhibits were not competent evidence for any purpose in the case. It is apparent on the face of each exhibit including the "attached" "monthly records," that it is a record of inter-departmental transactions showing transfer of lumber from yard to yard within the plaintiff's organization. Each exhibit has the designation of the results of the calculations thereon as Book Profits or Book Losses. Transfer of manufactured lumber from yard to yard or about the yard of the Batterson mill cannot be made the basis for a write-up to support a claim for loss of profits until there is some evidence that the figures, from which the cost of lumber was deducted for the purpose of showing such profits, were market prices or market value figures. No presumptions can aid the plaintiff here.

The statement by plaintiff's counsel, above made, that "They are offered for the purpose of supporting the testimony of the witness as to what the anticipated profits would have been if they could have operated," we apprehend refers to plaintiff's witness Ray Gould's testimony. Clearly witness Gould's testimony added nothing to the exhibits and the exhibits added nothing to Gould's testimony.

SPECIFICATION OF ERROR NO. IV

The Court erred in finding that Appellee sustained damages in the amount of $118,000 loss of profits in the operation of its mill at Batterson, Oregon by the attempted sale by McKenney and Glaser of their interest in the properties described in the contract, Exhibit 1, and that McKenney and Glaser became liable for such loss of profits; and the Court erred in its conclusion of law that defendants McKenney and Glaser are liable to plaintiff for $168,000 damages (of which $118,000 is a part thereof) sustained by it and specified in Finding of Fact XII by reason of the breach of the contract, which is plaintiff's Exhibit 1, by reason of the attempted sale and conveyance on September 1, 1951 to defendant McKenney Logging Corporation (Finding of Fact XII, Tr. 88, 93); and the Court erred in awarding judgment thereon, in that loss of profits is not the proper measure of damages in this case for the timber to be sold to the Plaintiff-Appellee had at all times an established and ready market and there was a readily determinable market price for the goods in question. The finding is clearly erroneous.

Points and Authorities

1. Where there is an available market for the goods in question, the measure of damages for failure to deliver goods contracted for, in the absence of special circumstances showing *proximate* damages of a greater amount, is the difference between the contract price and

the market or current prices of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.

Section 71-167 O.C.L.A.
75.670 Oregon Revised Statutes } (Section of Uniform Sales Act)

Watson v. Oregon Moline Plow Co., 112 Ore. 416, p. 432, 227 P. 278 at p. 284.
Norwood Lumber Corporation v. McKean, 153 F. (2d) 753.

2. Plaintiff must show lack of available market as part of plaintiff's case.

Norwood Lumber Corporation v. McKean, 153 F. (2d) 753.

3. Even though no market exists at the place where delivery was due, the nearest available market furnishes the basis under such circumstances, the expense of obtaining and transporting the goods from that market to the place where delivery is due being added.

Williston on Contracts (1937), Sec. 1384, p. 3873.
Williams v. Pacific Surety Co., 77 Or. 210 at 220, 146 P. 147 and 149 P. 524 at 526.

4. In Oregon the party claiming damages must prove them.

Austin v. Bloch, 165 Ore. 116, 119, 105 P. (2d) 868 at 869.

Argument

The Plaintiff-Appellee by its own evidence in the instant case proved almost to the point of demonstration that there was an available market where the logs might have been purchased in order to keep the Batter-

son mill in continuous operation for the period for which the District Court awarded damages for loss of profits of $118,000. Such proof is due in part in that the record is replete with testimony and documentary evidence that the kind of logs used in the Batterson mill was #2 old growth fir saw logs. There are numerous scale sheets in the record as exhibits, but for convenience, reference here will be made only to plaintiff's Exhibit 4 which consists of Scale Sheet by Handler & Schneider and is set out at page 156 transcript of record. There is no dispute that the logs were properly scaled and it may be observed from the scale sheet itself there was nothing unusual about the logs for immediately before the signature of scaler, A. V. Schneider appears the following which we quote:

> "This is to certify that the above was scaled and graded, and the measurements and grades as therein set forth have been determined in a careful manner without fear or favor according to the standard rules for the scaling and grading of logs."

Therefore the logs to be sold and to be purchased by Buffelen were ordinary fir logs such as were available then and have been continuously and will be available so long as there is timber in Tillamook County, or other parts of Oregon or elsewhere.

On page 154 of the record as part of plaintiff's Exhibit 4 is a check made by the Buffelen Manufacturing Company, No. 26662, in voucher form payable to the McKenney Logging Company for $19,379.86. The voucher shows that $18,791.54 thereof is for the price of logs per attached statement, and the attached statement

is the above mentioned Scale Sheet by Handler & Schneider. The balance of $776.24 is made up of rafting and booming charges on 388,120 feet less 1% discount on the $18,791.54. Such were the usual transactions prior to the controversy herein. Buffelen purchased and the McKenney Logging Company sold at market prices.

The contract, Exhibit 1 (Tr. 131, par. c and d of contract), states that the Lumber Company agrees to purchase from the Loggers all merchantable fir logs except those dumped in the company's mill pond at Batterson which the Loggers may remove from either their lands or the lands of the Lumber Company at the market price for such logs on cars at the Loggers reload at Batterson, or the Lumber Company may, at its option, have any of the said logs which it may select dumped in its log pond at Batterson. Also the Lumber Company agreed to purchase from the Loggers all merchantable fir logs which the Loggers may remove from either their land or the lands of the Lumber Company and are dumped into the Lumber Company's pond at Batterson at the said market price of logs on cars at Batterson less $0.50 per thousand.

Throughout the dealings between Buffelen and the partners it is undisputed that the logs purchased by Buffelen and sold by the partners to Buffelen were bought and sold at the current market price. In fact, 55,546,171 feet were so sold to Buffelen for more than 2½ million dollars (Exhibit 16, Tr. 391).

In 1951, 15,216,540 feet were so sold for $758,498.67 (Plaintiff's Exhibit 16, Tr. 391). Of course, the market

price was not a negotiated price between Buffelen and the Loggers but was a price entirely determined by current market conditions in the entire lumber industry. In *Norwood Lumber Corporation v. McKean,* 153 F. (2d) 753, (at page 756), there was a question whether or not there was any available market at all where the buyer could have purchased the lumber. The action there was brought for breach of contract. Plaintiff purchased a quantity of lumber from the defendants. Before delivery to plaintiff defendants sold the lumber to another. The District Court directed a verdict in favor of defendants, and was reversed. The Court pointing out there was some testimony by a witness who testified that "he knew that country and had for years, and knew that there was no such thing as lumber like that," and also there was some further testimony that "one of the defendants, said that he did not know where he could go and buy 50,000 feet of seasoned oak in the community." The United States Court of Appeals (3rd Circuit) decided that this testimony tended to show the lack of available market at which one could purchase such lumber in the community and commented that the jury might have accepted such testimony or the defendants might have smothered it.

It is submitted that the above figures offered by the plaintiff that Buffelen had purchased over 55 million feet of logs at current market prices conclusively shows there was a market where the prices of such logs was established and it necessarily follows that Buffelen could have purchased any quantity of #2 old growth fir

sawmill logs at the market prices in order to keep the Batterson mill in continuous operation when and if such logs were not made available to Buffelen by McKenney and Glaser: And there being an available market where such logs could be purchased the correct measure of damages in the instant case is not one for loss of profits but that the measure of damages is the one made by Sec. 75.670 Oregon Revised Stautes, and to be applied as stated by the United States Court of Appeals, Third Circuit in *Norwood Lumber Corporation v. McKean,* supra. Section 75.670 Oregon Revised Statutes and the Section of the Uniform Sales Act analyzed in *Norwood Lumber Corporation v. McKean* are the same. We quote 71-167 of Oregon Complied Laws Annotated (1940) which is now 75.670 Oregon Revised Statutes (1953):

"ACTION FOR FAILING TO DELIVER GOODS.

"(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"(2) The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

(L. 1919, ch. 91, Sec. 67, p. 95; O.L. Sec. 8228; O.C. 1930, Sec. 64-705)."

The Oregon cases involving questions of loss of profits and use value of premises are not applicable to the factual situation involved here, for in the final analysis all that the defendants McKenney, Glaser can be held liable for, if at all, is the failure to offer a readily marketable product, to the plaintiff, which the plaintiff could have at all times purchased in the open market, at the current market prices, therefor.

Since and before *Watson v. Oregon Moline Plow Co.,* 112 Ore. 278, p. 432, 227 P. 278, it has been the law in Oregon that if there is an available market for the goods contracted for which the seller fails to deliver, the rule of damages is as set out in the applicable portion of the Uniform Sales Act which in the instant case is 75.670 Oregon Revised Statutes.

It may be anticipated that plaintiffs will make the same contention here as was made by the plaintiff in *Norwood Lumber Corporation v. McKean,* 153 F. (2d) p. 755, that although there was a market where the logs could be purchased from other sellers than the defendants that this fact is a matter for mitigation of damages and that the burden showing mitigation is upon the party showing mitigating circumstances. The United States Court of Appeals said in *Norwood Lumber Corporation v. McLean,* supra, in response to such argument:

"This is the wrong analysis. Mitigating circumstances are not involved here. It lies upon the one

> asserting damages to prove them. Plaintiff must show a market price, if there is one, to establish its damages of the difference between contract price and market price. If there is no market price and plaintiff claims damages on some other basis, it must show the facts, both as to he absence of market and those on which some other measure of damages may be based."

The Court further stated at page 757:

> "We do not mean to say that a plaintiff buyer can recover prospective profits at its option. The usual measure of damages is established by the statute as already stated. But if the plaintiff proves lack of a market where it can get the goods from another, it is thrown perforce to a more elaborate measure of damages. We think the trial court unduly restricted the plaintiff in its attempt to prove its question in this instance."

The Plaintiff-Appellee was not so restricted or restricted at all in its proof and as above stated, there was and is a market to both buyers and sellers for practically any quantity of #2 old growth fir logs.

Sufficient such logs were available at the Batterson Mill (Tr. 302), but if there had not been, it is submitted that the rule stated by Williston, Sec. 1384, page 3874, furnishes the basis under such circumstances. The rule of the expense of obtaining and transporting the goods from that market to the place where delivery is due being added becomes applicable.

Williams v. Pacific Surety Co., 77 Or. 210, 220, 146 Pac. 147, 149 Pac. 524, so holds.

SPECIFICATION OF ERROR NO. V

The Court erred in Finding No. XII wherein the Court found that plaintiff sustained damages of $50,000 for timber removed by defendant McKenney Logging Corporation by reason of breach of the contract, Exhibit 1, and by the attempted sale by defendants McKenney and Glaser of their interest in the properties the rights covered by the contract to McKenney Logging Corporation, in that such finding is clearly erroneous, for it is based upon a misconstruction of the contract.

The Court also erred in making Conclusion of Law XI and the judgment based thereon.

Points and Authorities

1. Plaintiff's Buffelen, right to the timber for which the $50,000 of the damages was awarded against McKenneys and Glasers, was only the right to refuse to purchase and pay the market price therefore. This was the construction placed on Exhibit 1, the contract, by the parties in their dealings with respect to the timber involved. Such construction should be adopted.

Lease v. Corvallis Sand & Gravel Co., 185 F. (2d) 570, 576, 9th Cir.

2. The effect of the findings and conclusions of law in this case is that the contract, Exhibit 1, was at all times in full force and effect, and therefore Finding No. XII as to the $50,000 damages sustained by plaintiff is

inconsistent with all other applicable findings and conclusions of law herein. If the timber, 2,000,000 feet for which the $50,000 was awarded had not been removed and was still on the lands, the partners would have the right to under the contract cut such 2,000,000 feet, offer it to Buffelen, and whether Buffelen purchased it or not, the partners would be paid the $50,000, presuming that $25 is the market price per thousand feet therefore. Compensation is the guiding rule in damages.

> Title & Trust Co. v. U. S. Fid. & Guaranty Co., 138 Or. 467, 500, 1 P. (2d) 1100, 7 P. (2d) 805, 811.

Argument

The District Court held that the contract was not a security transaction and construed the contract adversely to defendants' issue of law IX, pre-trial order (Tr. 26). But the fact remains, as above stated that the Court has in effect held the contract is in full force. Under the contract the partners were at all times entitled to the $50,000 whether Buffelen bought the 2,000,000 feet of logs in question or not. All Buffelen had was the right to purchase or refuse to purchase the logs produced by the partners, McKenney and Glaser. We have cited *Title & Trust Co. v. U. S. Fidelity & Guaranty Co.,* 138 Or. 467 for the statement therein at page 500, where the Court says:

> "We have carefully read all the authorities cited and find none that changes the principle that 'compensation is the guiding rule in damages.' " (Citation omitted)

Except in cases fit for punitive damages, compensation to repair the loss is, of course, the rule. If Buffelen is entitled to any damages at all, the most such damages should amount to is the value of the right to purchase, which is all that Buffelen could have lost if the logs were not tendered to it for purchase. As already pointed out, if Buffelen had purchased the logs, Buffelen would have had to pay the $50,000 to the partners. Buffelen has no right to an unjust enrichment of the $50,000.

SPECIFICATION OF ERROR NO. VI

The Court erred in rejecting defendants' offer of pretrial Exhibit No. 24. Tr. 554-567 inclusive.

Points and Authorities

The exhibit was admissible as an aid to interpreting contract, Exhibit 1.

2-218 O.C.L.A.

2-218 Oregon Compiled Laws Annotated:

> "For the proper construction on an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Williston on Contracts (1937), Section 629, p. 1804.

Argument

While the Exhibit No. 24—rejected—was offered after the case had been submitted and at the close of

the argument, the Court in the exercise of its discretion, ruled upon the offer. In a case tried partly on the security transaction theory as was done here, Exhibit No. 24 was clearly material. And as above stated it was admissible as an aid in interpreting the contract, Exhibit 1.

SPECIFICATION OF ERROR NO. VII

The Court erred in construing the contract Exhibit 1, so that, the contract by its terms contemplated that the partnership would become liable for loss of profits in the operation of the Batterson mill if the partnership failed to offer logs to the plaintiff.

SPECIFICATION OF ERROR NO. VIII

Tht Court erred in construing the contract so that no interest in the timber and timber lands and facilities vested in the partnership, and that the contract granted only cutting rights to the partnership.

SPECIFICATION OF ERROR NO. IX

The Court erred in finding that the use value of the mill based upon loss of profits was the measure of damages herein.

SPECIFICATION OF ERROR NO. X

The Court erred in entering judgment against the defendant McKenney Logging Corporation, without providing in such judgment that payment in excess of

$100,000, thereon should be applied pro tanto upon the judgment of $168,000, against the partnership defendants for the findings do not support such duplication of $168,000, and there is no evidence upon which to base such duplication. The error is apparent on the face of the judgment in that the provisions of the judgment do not follow the findings and conclusions of law.

SPECIFICATION OF ERROR NO. XI

The Court erred in not granting Appellants' Bart McKenney and Marie McKenney Motions for Amendments to the Judgment and Decree, and for a new trial.

SPECIFICATION OF ERROR NO. XII

The Court erred in entering judgment against the defendants, Bart McKenney, Marie McKenney, Einar Glaser, and Dorothy Glaser in the sum of $168,000, in that the findings upon which said judgment is based, are clearly erroneous, and not supported by substantial evidence.

SPECIFICATION OF ERROR NO. XIII

The Court erred in admitting into evidence Exhibit No. 22, which is discussed under Specification of Error No. I hereof. It is a statement entitled "Results of operation of the Batterson Mill from June 1, 1951 to October 30, 1952. The offer, the objections thereto, and the ruling thereon appear on pages 475 to 479, inc.

CONCLUSION

It is respectfully submitted that the judgment and decree herein that plaintiff have and recover judgment against the defendants Bart McKenney, Marie McKenney, Einer Glaser and Dorothy Glaser, and each of them, jointly and severally for the sum of $168,000, be reversed.

It is respectfully submitted that the plaintiffs are not entitled to damages herein under the facts and the applicable law, and that the Appellants Bart McKenney and Marie McKenney are entitled to have the contract, Exhibit 1, construed pursuant to the rules of law hereinabove stated, and that the Judgment and Decree of the District Court be corrected as contended for by the Appellants Bart McKenney and Marie McKenney herein. A new trial should be granted.

Respectfully submitted,

THEODORE B. JENSON,
DEWEY H. PALMER,
DAVIS, JENSEN & MARTIN,

Attorneys for Appellants,
Bart McKenney and Marie McKenney.

, 1949

	YEAR TO DATE		
	QUANTITY	AMOUNT	AVERAGE
Mate	LOG FEET		
L	8,062,466	$ 245,271.09	$ 30.42
O	65,247	- 0 -	- 0 -
	8,127,713	$ 245,271.09	$ 30.18
Pay	BOARD FEET		
S		$ 7,020.68	$ .86
S		77,015.95	9.48
I		10,236.19	1.26
M		11,329.64	1.39
P		4,408.12	.54
		$ 110,010.58	$ 13.53
Man			
R		$ 33.27	$ .01
S		1,565.83	.19
O		9,879.95	1.22
M		17,697.87	2.18
M		6,133.99	.75
		$ 35,360.91	$ 4.35
Fix			
D		$ 42,590.21	$ 5.24
I		11,920.59	1.47
F		57.46	- 0 -
T		2,000.00	.25
		$ 56,568.26	$ 6.96
		$ 5,013.22	$ .62
Mis	8,127,713	$ 449,093.39	$ 55.25
	719,473	35,160.76	48.87
Add	366,043	10,866.27	29.69
Ded	8,579,654	$ 473,387.88	$ 55.18
			VALUE REALIZED
Dis			
T	5,358,569		$395,863.45
S	3,122,574		75,506.94
S			(11,010.90)
	8,481,143	$ 473,387.88	$460,359.49
P	98,511	6,895.77	
	8,579,654	$ 466,492.11	$460,359.49
			$ 6,132.62
Log			

1949

YEAR TO DATE		
QUANTITY	AMOUNT	AVERAGE
LOG FEET		
8,062,466	$ 245,271.09	$ 30.42
65,247	- 0 -	- 0 -
8,127,713	$ 245,271.09	$ 30.18
BOARD FEET		
	$ 7,020.68	$ .86
	77,015.95	9.48
	10,236.19	1.26
	11,329.64	1.39
	4,408.12	.54
	$ 110,010.58	$ 13.53
	$ 33.27	$ .01
	1,565.83	.19
	9,879.95	1.22
	17,697.87	2.18
	6,133.99	.75
	$ 35,360.91	$ 4.35
	$ 42,590.21	$ 5.24
	11,920.59	1.47
	57.46	- 0 -
	2,000.00	.25
	$ 56,568.26	$ 6.96
	$ 5,013.22	$ .62
8,127,713	$ 449,023.39	$ 55.25
719,473	35,150.76	48.87
366,043	10,866.27	29.69
8,579,654	$ 473,337.88	$ 55.18
		VALUE REALIZED
5,358,569		$395,863.45
3,122,574		75,506.94
		(11,010.90)
8,481,143	$ 473,337.88	$460,359.49
98,511	6,825.77	
8,579,654	$ 466,512.11	$460,359.49
		$ 6,132.62

1949

QUANTITY	AMOUNT	AVERAGE
YEAR TO DATE		
LOG FEET		
8,062,466	$ 245,271.09	$ 30.42
65,247	- 0 -	- 0 -
8,127,713	$ 245,271.09	$ 30.18
BOARD FEET		
	$ 7,020.68	$ .86
	77,015.95	9.48
	10,236.19	1.26
	11,329.64	1.39
	4,408.12	.54
	$ 110,010.58	$ 13.53
	$ 33.27	$ .01
	1,565.83	.19
	9,879.95	1.22
	17,697.87	2.18
	6,133.99	.75
	$ 35,360.91	$ 4.35
	$ 42,590.21	$ 5.24
	11,920.59	1.47
	57.46	- 0 -
	2,000.00	.25
	$ 56,568.26	$ 6.96
	$ 5,013.22	$ .62
8,127,713	$ 449,003.39	$ 55.25
719,473	35,150.76	48.87
366,043	10,856.27	29.69
8,579,654	$ 473,337.88	$ 55.18
		VALUE REALIZED
5,358,569		$395,863.45
3,122,574		75,506.94
		(11,010.90)
8,481,143	$ 473,337.88	$460,359.49
98,511	6,825.77	
8,579,654	$ 466,512.11	$460,359.49
		$ 6,132.62

1949

YEAR TO DATE		
QUANTITY	AMOUNT	AVERAGE
LOG FEET		
8,062,466	$ 245,271.09	$ 30.42
65,247	- 0 -	- 0 -
8,127,713	$ 245,271.09	$ 30.18
BOARD FEET		
	$ 7,020.68	$ .86
	77,015.95	9.48
	10,236.19	1.26
	11,329.64	1.39
	4,408.12	.54
	$ 110,010.58	$ 13.53
	$ 33.27	$ .01
	1,565.83	.19
	9,879.95	1.22
	17,697.87	2.18
	6,133.99	.75
	$ 35,360.91	$ 4.35
	$ 42,590.21	$ 5.24
	11,920.59	1.47
	57.46	- 0 -
	2,000.00	.25
	$ 56,568.26	$ 6.96
	$ 5,013.22	$ .62
8,127,713	$ 449,093.39	$ 55.25
719,473	35,150.76	48.87
366,043	10,856.27	29.69
8,579,654	$ 473,337.88	$ 55.18
		VALUE REALIZED
5,358,569		$395,863.45
3,122,574		75,506.94
		(11,010.90)
8,481,143	$ 473,337.88	$460,359.49
98,511	6,825.77	
8,579,654	$ 466,512.11	$460,359.49
		$ 6,132.62

1949

YEAR TO DATE		
QUANTITY	AMOUNT	AVERAGE
LOG FEET		
8,062,466	$ 245,271.09	$ 30.42
65,247	- 0 -	- 0 -
8,127,713	$ 245,271.09	$ 30.18
BOARD FEET		
	$ 7,020.68	$ .86
	77,015.95	9.48
	10,236.19	1.26
	11,329.64	1.39
	4,408.12	.54
	$ 110,010.58	$ 13.53
	$ 33.27	$ .01
	1,565.83	.19
	9,879.95	1.22
	17,697.87	2.18
	6,133.99	.75
	$ 35,360.91	$ 4.35
	$ 42,590.21	$ 5.24
	11,920.59	1.47
	57.46	- 0 -
	2,000.00	.25
	$ 56,568.26	$ 6.96
	$ 5,013.22	$ .62
8,127,713	$ 449,093.39	$ 55.25
719,473	35,150.76	48.87
366,043	10,866.27	29.69
8,579,654	$ 473,337.88	$ 55.18
		VALUE REALIZED
5,358,569		$395,863.45
3,122,574		75,506.94
		(11,010.90)
8,481,143	$ 473,337.88	$460,359.49
98,511	6,025.77	
8,579,654	$ 466,522.11	$460,359.49
		$ 6,132.62

1949

YEAR TO DATE		
QUANTITY	AMOUNT	AVERAGE
LOG FEET		
8,062,466	$ 245,271.09	$ 30.42
65,247	- 0 -	- 0 -
8,127,713	$ 245,271.09	$ 30.18
BOARD FEET		
	$ 7,020.68	$ .86
	77,015.95	9.48
	10,236.19	1.26
	11,329.64	1.39
	4,408.12	.54
	$ 110,010.58	$ 13.53
	$ 33.27	$ .01
	1,565.83	.19
	9,879.95	1.22
	17,697.87	2.18
	6,133.99	.75
	$ 35,360.91	$ 4.35
	$ 42,590.21	$ 5.24
	11,920.59	1.47
	57.46	- 0 -
	2,000.00	.25
	$ 56,568.26	$ 6.96
	$ 5,013.22	$ .62
8,127,713	$ 449,003.39	$ 55.25
719,473	35,150.76	48.87
366,043	10,866.27	29.69
8,579,654	$ 473,337.88	$ 55.18
		VALUE REALIZED
5,358,569		$395,863.45
3,122,574		75,506.94
		(11,010.90)
8,481,143	$ 473,337.88	$460,359.49
98,511	6,825.77	
8,579,654	$ 466,512.11	$460,359.49
		$ 6,132.62

1949

YEAR TO DATE		
QUANTITY	AMOUNT	AVERAGE
LOG FEET		
8,062,466	$ 245,271.09	$ 30.42
65,247	- 0 -	- 0 -
8,127,713	$ 245,271.09	$ 30.18
BOARD FEET		
	$ 7,020.68	$ .86
	77,015.95	9.48
	10,236.19	1.26
	11,329.64	1.39
	4,408.12	.54
	$ 110,010.58	$ 13.53
	$ 33.27	$ .01
	1,565.83	.19
	9,879.95	1.22
	17,697.87	2.18
	6,133.99	.75
	$ 35,360.91	$ 4.35
	$ 42,590.21	$ 5.24
	11,920.59	1.47
	57.46	- 0 -
	2,000.00	.25
	$ 56,568.26	$ 6.96
	$ 5,013.22	$ .62
8,127,713	$ 449,023.39	$ 55.25
719,473	35,150.76	48.87
366,043	10,866.27	29.69
8,579,654	$ 473,387.88	$ 55.18
		VALUE REALIZED
5,358,569		$395,863.45
3,122,574		75,506.94
		(11,010.90)
8,481,143	$ 473,387.88	$460,359.49
98,511	6,865.77	
8,579,654	$ 466,522.11	$460,359.49
		$ 6,132.62